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IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1978

No. 78-934

GENOVA DOMINGUEZ, as Administratix of the Estate of Francisco Dominguez, Deceased, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Genova Dominguez, the petitioner herein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for

the Second Circuit entered in this matter on September 11, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, unreported, is printed in Appendix A hereto, infra, pp. 15 to 20. The opinion of the United States District Court for the Eastern District of New York, also printed in Appendix A, pp. 8 to 14, is reported as follows: 24 FR Serv. 2d 1414.

JURISDICTION

The judgment of the Court of Appeals was entered September 11, 1978, Appendix A pp. 15 to 20. A timely petition for rehearing was denied on November 1, 1978, Appendix A, pp. 21 to 22. The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

QUESTION PRESENTED

Whether the procedure which has culminated in the dismissal of petitioner's suit violates the Due Process Clause of the Fifth Amendment.

RULES, STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

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* * * * *

STATEMENT

This is a suit by Genova Dominguez, as Administratrix of the Estate of Francisco Dominguez, Deceased, to recover for wrongful death on behalf of herself and minor children of the deceased.

On March 17, 1975, three men attempted to rob the grocery store operated by the deceased, Francisco Dominguez, at 76 Nevins Street, Brooklyn, New York. An alarm, tripped off by one of the customers, caused two of the perpetrators to flee from the scene and attracted the attention of a special agent of the Federal Bureau of

Investigations, who happened to be in the area. The agent entered the premises, with his gun drawn, and identified himself as a police officer.

When the alarm went off, one of the perpetrators could not escape from the premises because he had been restrained behind the counter by the deceased. A shot gun was lying on the counter, in front of the perpetrator when the agent entered the store. The perpetrator made a forward movement, which the agent interpreted as a movement toward the shot gun, and he, the agent, fired twice; killing both, the perpetrator and the deceased, Francisco Dominguez.

The decedent was 43 years of age and is survived by his wife, Genova Dominguez, and four minor children named as follows: Francisco, 15 years of age; Jose, 13 years

old; Maria, 12 years old and Mareily, 5 years old, at the time of their father's death.

The decedent was, with his family, admitted to the United States, as a refugee from Cuba, on March 16, 1971, and resided in the County of Kings, State of New York.

In connection with the prosecution of this action the following has taken place:

Petitioner obtained Letters of Administration on October 31, 1975. (A.-5)

On November 26, 1975, a claim for death was submitted to the Department of Justice. The claim was denied on January 26, 1976.

This action was instituted on June 26, 1976, pursuant to the Federal Tort Claims Act, 28 USC 1346(b), 2671 et seq. (A.-2 to 4).

Sometime during September, 1976, petitioner's attorney received an answer to plaintiff's complaint dated: August 25, 1976.

On October 6, 1976, petitioner's attorney requested, and in due course received, a copy of the Aided/Accident Report from the New York City Police Department. The information contained in that report listed the name and address of two witnesses to the incident which gave rise to petitioner's claim.

Sometime during December, 1976, "Fred, one of the law clerks to Judge Platt", telephoned petitioner's attorney and notified him of the scheduling of a pre-trial status conference for February 11, 1977, in this matter.

Petitioner's attorney did not receive any other communication from "Fred" and

on February 8, 1977, he called the Judge's Chambers and asked to talk to "Fred".

The person who answered the telephone, indicated that "Fred" was not available and, upon learning that the caller was an attorney, indicated that he was also a law clerk to Judge Platt and could, probably, be able to help.

Petitioner's attorney explained to the person on the other end of the line that he was calling to confirm the time, date and place for a pretrial status conference which "Fred" had scheduled for February 11, 1977, in this matter.

The person on the other end of the wire asked petitioner's attorney to hold while he looked for the record.

Upon his return to the line, that person stated that no pretrial status

conference had been scheduled for February 11, 1977, on this matter. That an answer to the complaint had not been received yet and that no conference could be had before the answer to the complaint was received by the Judge's Chambers.

Petitioner's attorney urged this person to make sure because "Fred" had told him that he was scheduling such a conference for February 11, 1977, at 11:00 A.M.

The person on the other end assured petitioner's attorney that no pretrial conference had been scheduled for February 11, 1977, in this case and that, at any rate, petitioner's attorney would be notified, in writing, of the time and date for such conference whenever it was scheduled.

The first time petitioner's attorney learned of the scheduling of a pretrial

status conference for February 18, 1977 was sometime during March, 1977, when he received a letter from the Office of the U.S. Attorney, notifying him that the action had been dismissed pursuant to Fed. R. Civ. P. 41. That they had not submitted the order of dismissal but would do so if they did not hear from petitioner's attorney within 10 days. The information contained in this letter turned out to be wrong.

Petitioner's attorney learned, for the first time, that the action had been dismissed pursuant to Rule 8(a) of the Local Calendar and Assignment Rules, and not pursuant to Fed. R. Civ. P. 41, from the Memorandum and Order appealed from. (A.-9).

It should be noted here, that petitioner's attorney was never notified

of the scheduling of a pretrial status conference for February 18, 1977, that neither petitioner nor her attorney were ever ordered to appear before Judge Platt, or any other judge, that they never had the opportunity to appear before a judge before the action was dismissed, that issue had been joined only five months before the dismissal of the action on petitioner's attorney failure to appear at a status conference of which he had not been notified and that the dismissal was with prejudice pursuant to the limitations of time contained in 28 USC 2041. (A.-4).

After receipt of the letter from the U.S.Attorney's Office, petitioner's attorney visited Mr. Rudofsky, the Assistant U.S. Attorney in charge of the prosecution of this case for the govern-

ment, with a view to obtaining a stipulation to vacate the dismissal.

Mr. Rudofsky, on that occassion, expressed a strong belief that the action had no merits but offered not to submit the proposed order of dismissal or to oppose a motion to vacate.

Mr. Rudofsky pointed out, to petitioner's attorney, that he was going to have a hard time trying to get this case back on the calendar because; first, he would never be able to get "Fred Townsend to admit that he had made a mistake"; second, the case was to be tried by a judge without a jury; third, Judge Platt was by now convinced that the petitioner's claim had no actual merit.

From one of the witnesses listed in the Aided/Accident Report, supra,

petitioner's attorney learned that that there had been a Grand Jury Investigation into the death of Francisco Dominguez, and after his visit to Mr. Rudofsky, he decided to obtain a copy of the minutes of the Grand Jury Investigation to bolster his motion to reinstate and, possibly, for use in a motion for summary judgment that he intended to make.

To obtain the minutes of the Grand Jury Investigation a motion had to be made in the Supreme Court of the State of New York, for an order, signed on April 6, 1977, directing the District Attorney for Kings County to permit petitioner's attorney to obtain a copy of the same.

After the order was signed, petitioner's attorney had to locate the stenographer of the Grand Jury, a task which proved difficult because he was no longer in

the employ of the Supreme Court of the State of New York.

A copy of the minutes of the Grand Jury Investigation was finally delivered to petitioner's attorney, in person, during June, 1977.

On May 27, 1977, the floor of the premises where the office of petitioner's attorney is located caved in, and his records and his equipment were stored away in the basement of the premises, inaccessible to him. It was not until December 18, 1977, after the repairs were completed, that petitioner's attorney regained access to his records and equipment.

On January 31, 1978, petitioner's attorney filed the notice of motion to vacate the dismissal pursuant to Fed. R. Civ. P. 60(b), within the year time

limitation contained in that rule. The hearing on this motion was argued on February 22, 1978.

The District Court, erroneously, held that the circumstances narrated above did not constitute the excusable neglect required by Fed. R. Civ. P. 60(b), and, further, that the motion to vacate had not been timely made. (A.-8 to 14). An appeal was taken to the Court of Appeals for the Second Circuit, which affirmed the order. (A.-15 to 20).

SUMMARY OF ARGUMENT

Dismissal for unexplained absence from a pretrial conference alone is not authorized either by rule or by doctrine.

Dismissal of petitioner's cause of action has deprived the Estate of Francisco Dominguez, Deceased, of its property without due process of law contrary to the provisions of the Fifth Amendment.

The decisions within the Second Circuit and in other circuits, in cases dealing with issues similar to the ones presented by this case, are in conflict and there is need for uniformity.

ARGUMENT

I. Dismissal for unexplained absence from a pretrial conference alone is not authorized either by rule or by doctrine.

The District Court for the Eastern District of New York, has elected to manage its own affairs "so as to achieve the orderly and expeditious disposition of cases" by adoption of the Court's Assignment and Calendar Rules. The authority of the court to impose sanctions for the non-compliance with these rules is limited by the provisions contained in the same rules.

Under Rule 7, of these Assignment and Calendar Rules, the judge to whom a case is assigned, is empowered to direct the attorneys for each party to meet with him to discuss the case informally, to discuss

settlement or set a schedule for the case. (A.-7).

Rule 8(b), of the same rules, specifically provides that if counsel fails to comply with Rule 7, supra, the judge "may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business". (A.-7).

Rule 8(b), limits the authority of the court to impose sanctions for non compliance with the provisions of Rule 7, to the assessment of costs directly against counsel and by implication, it prohibits involuntary dismissals or the entry of judgments by default for this reason.

This construction, petitioner submits, is required for the reason that non compliance with the provisions of Rule 7, (A.-7), failure to meet with the judge

after the case has been assigned, is not equivalent to the violation of an order to perform a specific act, nor can it be interpreted as either a failure to prosecute or an abandonment of the case, and would, therefore, seem to require the use of lesser sanctions than dismissal or entry of judgment by default.

The record facts of this case show that there was a serious and continuous intent to litigate these claims to a final conclusion with the expenditure of time and expense on behalf of petitioner. Before the action could be initiated, all the requirements of the Tort Claims Act, 28 USC 1346, 2571 et seq., had to be satisfied. A proceeding to appoint the petitioner as Administratrix of the Estate of Francisco Dominguez, Deceased, had been had in the Surrogate's Court, Kings County,

in order to comply with the requirements of EPTL 5-4.1. (A.-5). The claim had been presented to the U.S. Department of Justice for adjustment as required by 28 USC 2672. The action had been commenced within the six month after the denial of the claim by the Department of Justice. (A.-4).

At the time of the dismissal, February 18, 1977, for the unexplained absence of petitioner's attorney from a pretrial conference alone, the case was only six month old. There had been no prior "proding" of the petitioner by the court or the defendant. The six month limitation of time contained in 28 USC 2401, had run. (A.-4, 23).

This court, in Link v Wabash Railroad Company, 370 US 626, 634 (1962), 82 S. Ct. 1386, expressly reserved for future decision whether unexplained absence from a pretrial conference would alone justify a dismissal

with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff.

The Court of Appeals for the Second Circuit resolved a very similar question in the negative. In Schenck v Bear, Stearns & Co., Inc., 25 FR Serv 2d 1505, 1508, __F.2d__ (1978), the Court held that where defendant's counsel made no request for a dismissal, there had been no other pretrial or scheduling conference, nor was there any judicial participation indicating that a dismissal might be in the offing; "The sound exercise of discretion requires a judge to use lesser sanctions than dismissal in the appropriate case".

The Court of Appeals for the Third and Fourth Circuits have determined this same question in the negative in their decisions in Fischer v Buehl, 450 F.2d 950, 951

(CA3, 1971), and Dove v Codesco, 569 F.2d 806 (CA4, 1978).

It is submitted that these decisions, of the Second, Third and Fourth Circuits, are sound. Their validity rests on two important grounds. First, against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits. Secondly, the power to dismiss should be exercised only on the face of a clear record of delay or contumacious conduct by the plaintiff. See Durham v Florida East Coast Ry. Co., 385 F.2d 366, 368 (CA5, 1967); also Reizakis v Loy, 490 F.2d 1132, 1135 (CA4, 1974).

In Beaufort Concrete Company v Atlantic States Construction Company, 352 F.2d 460, cert. denied, 384 U.S. 1004, 86 S.Ct. 108 (1966), Black, J., dissenting; Mr. Justice Black quoted from his dissent

to the Federal Rules as follows:

> "Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief among many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out of court affidavits, pretrial depositions, and other pretrial techniques." 384 U.S. 1034.

II. The order dismissing petitioner's cause of action deprived the Estate of Francisco Dominguez, Deceased, of its property without due process of law contrary to the provisions of the Fifth Amendment.

The Estate of Francisco Dominguez, Deceased, had a valuable right and a substantial claim for damages for wrongful death which were sufficiently implicated to give rise to due process requirements.

The action was dismissed solely to sanction the petitioner for the failure of her attorney to attend a pretrial status conference. Such punishment is contrary to provisions contained in the Local Federal Rules for the Eastern District of New York. See Rule 7, Rule 8(b) of the Court's Assignment and Calendar Rules. (A.-7).

The denial of the right to proceed on the merits, otherwise held to be a matter of public policy, raises a question of the highest significance, especially so, where the defendant is the United States of America, and the reason for the denial is not related in any manner to the merits of the case.

There is no rational basis for the dismissal of petitioner's cause of action because of the failure of her attorney to appear at the pretrial status conference scheduled by the Judge's Chambers. Whatever the reason for the absence of her attorney, the circumstances were such that the District Judge could not have resolved from the record, or by drawing upon his own personal knowledge or recollection, whether petitioner's attorney had been notified of the scheduling of the conference and where

there exists the least possibility of deprivation of constitutional rights then the function of the doctrine of condemnation only after a hearing could only had been served by affording petitioner a hearing.

This Court said in Hovey v Elliot, (1897) 167 US 409, 42 L ed 215, 17 S Ct 841, that:

"To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends".

III. The decisions within the Second Circuit and in other circuits, in cases dealing with issues similar to the ones presented by this case, are in conflict and there is need for uniformity.

In a very similar situation to that of the petitioner, the Court of Appeals for the District of Columbia Circuit held, in Bibeau v Northeast Airlines, Inc., 429 F.2d 212, 213 (1970), that the lower Court abused its discretion in refusing to reinstate the action pursuant to Rule 60, Fed. R. Civ.P., where defendant makes no factually supported claim of prejudice from the delay, the record indicates that there had been considerable preparation for trial, appellant's attorney never received the notice of impeding dismissal and the suit was brought on behalf of minor children.

The Court of Appeals for the Fifth Circuit held, in Pond v Braniff Airways Incorporated, 453 F.2d 347 (1972), that the lower court abuses its discretion in refusing to reinstate on motion under Rule 60(1), Fed. R. Civ. P., when the effect of the dismissal is to bar litigation on the merits because time for filing claim has expired. See also Roberts v Rehoboth Pharmacy, Inc., 574 F.2d 846 (CA5, 1975).

The Court of Appeals for the Ninth Circuit held, in Schwab v Bullocks, Inc., 508 F.2d 353, 355 (CA9, 1975), that the discretion of the District Judge to grant or deny a motion to vacate a default judgment is limited by three important considerations. First Rule 60(b) is remedial in nature and, therefore, must be liberally applied. Second, default judgments are generally disfavored, whenever possible

cases should be decided on their merits. Third, ". . . . where timely relief is sought from a default judgment and movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on the merits."

And as for timeliness, the Court of Appeals for the Second Circuit held, in United States v Cirami, 535 F.2d 736, 742 (1976), that a motion made within the year limit imposed by under Fed. R. Civ. P. 60(b) (1), (2), or (3), was timely. See also United States v Cirami, 563 F.2d 26, 32 (CA2, 1977).

There is no rational basis for the denial of petitioner's motion to reinstate pursuant to Fed. R.Civ. P. 60(b), the reasons stated in the decision of the District Court are in conflict with the

rulings within the Second Circuit and with the rulings in other circuits in cases dealing with similar circumstances.

It is respectfully submitted, that the District Court by virtue of the legal error committed in dismissing petitioner's suit, abused its discretion in denying her timely motion to reinstate under Fed. R. Civ. P. 60(b).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 24, 1978

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APPENDIX A

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Constitution of the United States

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The Constitution of the United States of America.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28 USC - Tort Claims Act

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 2671. Definitions.

As used in this chapter [28 USCS §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title [28 USCS §§ 1346(b) and 2401(b)] the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title [28 USCS § 2677] shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§ 2671, 2672, 2674–2680].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§ 2401. Time for commencing action against United States

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) a [A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Estates, Powers and Trusts Law of the State of New York

5-4.1 Action by personal representative for wrongful act, neglect or default causing death of decedent

The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such action must be commenced within two years after the decedent's death. When the distributees do not participate in the administration

...continued

of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit.

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Federal Local Rules - Eastern District of New York

Assignment and Calendar Rules

Rule 7. Conference.

After a case has been assigned, the judge may direct the attorneys for each party to meet with him to discuss the case informally, to entertain oral motions and, to the extent possible and desirable, to discuss settlement or to set a schedule for the case, including for discovery, pre-trial and trial.

Rule 8. Sanctions.

(a) *Dismissal or default.* Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set, may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defaulting party either with respect to a specific issue or on the entire case.

(b) *Imposition of costs on attorneys.* If counsel fails to comply with Rules 3(f), 6(f) or 7 or a judge finds that the sanctions in subdivision (a) are either inadequate or unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business.

Rule 9. Effective Date.

The effective date of these rules as originally adopted was October 6, 1969 and in its present form includes all amendments and additions thereto to December 1, 1976.

Order and Decision appealed from.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

GENOVA DOMINGUEZ, as Administratrix of the Estate of Francisco Dominguez, Deceased,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

----------x

76 C 1215

MEMORANDUM AND ORDER

MARCH 13, 1978

PLATT, D.J.

Plaintiff in this case moves pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (FRCP) for an order vacating this Court's dismissal of this matter due to plaintiff's failure to appear for a pretrial conference.

This case is a wrongful death action arising out of a somewhat bizarre and a very unfortunate set of circumstances. On March 17, 1975, at about 4:00 P.M., a robbery was taking place in decedent's grocery store. An agent of the Federal Bureau of Investigation (FBI) entered the store in response to a burglar alarm. Entering with his gun drawn, the FBI agent identified himself as a police officer. The robber then moved towards a shotgun lying within inches on the store counter in front of him and pointed directly at the agent, and the agent then fired two shots. The first of these shots hit the robber; the second, unfortunately, hit and killed the decedent who had been struggling with the robber and was standing behind him. The FBI agent was subsequently

absolved of criminal liability by a Kings County Grand Jury and of any wrongdoing by the Director of the FBI. These undisputed facts provide the basis for plaintiff's action to recover damages.

The facts surrounding the default which is the subject of the instant motion are as follows. On February 18, 1976, plaintiff's counsel failed to appear at a scheduled pretrial conference. Accordingly, this Court then dismissed plaintiff's complaint and an order to this effect was filed with the Clerk of the Court on February 22, 1977.1/ Defendant's attorney promptly notified plaintiff's counsel of the default, which notice was received on March 5, 1977. At a conference between the opposing parties on March 21, 1977, defendant's attorney indicated he would not oppose a prompt motion to reopen the case and plaintiff's attorney indicated such a motion would be made. This representation notwithstanding, plaintiff did not make the instant motion until late January 1978 and it was not argued before this Court until February 17, 1978, virtually one year after the original dismissal.

1/ Rule 8(a) of this Court's Assignment and Calendar Rules provides as follows:

> "(a) Dismissal or default. Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set, may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defaulting party with respect to a specific issue or on the entire case."

Plaintiff relies on FRCP 60(b) in making his instant motion. That Rule provides in pertinent part that:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect . . ."

In his affidavit supporting this motion, plaintiff's attorney claims that his failure to appear for the scheduled pretrial conference was due to misinformation received from this Court's chambers and thus was not his fault.2/

Further, plaintiff's attorney outlines steps taken by him in investigating plaintiff's claim during the spring of 1977. Finally, plaintiff's attorney alleges that due to a structural cave-in in his law offices which necessitated storage of his legal files in the basement, he was unable to work at all from May, 1977 to December, 1977.

2/ Plaintiff's counsel alleges, in his affidavit in support of the instant motion, that he was advised by one of this Court's law clerks that no pretrial conference was scheduled in this action because no answer had as yet been filed by the defendant. Plaintiff, however, knew this was not the case, an answer having been filed by defendant the preceding August, and yet (assuming his claim to be true) he failed to apprise this Court's law clerk of his mistake when he made his inquiry about the scheduled pretrial conference. Moreover, plaintiff's counsel never inquired of his opponent as to the apparent confusion surrounding the scheduled conference. In light of these facts, this Court is unpersuaded that plaintiff's counsel's failure to appear for the pretrial conference was itself based on "excusable neglect."

This Court does not consider all the above to be an adequate showing of "excusable neglect" either for plaintiff's failure to appear at the pretrial conference or the failure to move until virtually one year later to vacate this Court's order of February 18, 1976. See Fase v. Seafarers Welfare and Pension Plan, ___F.2d___, Nos. 77-7380, 77-7489 (2d Cir. February 22, 1978). That this Court might have somehow been partly responsible for plaintiff's attorney's failure to appear at that time,3/ would certainly have been relevant in the resolution of a prompt motion to restore this action to the calendar. Such a prompt motion might well have yielded a different result. See Johnson v. Town of Babylon, ___F.Supp.___ , No. 77C 1183 (E.D.N.Y. March 13, 1978).

The year's delay in making the instant motion, however, requires its denial. Indeed, as FRCP 60(b) specifically provides:

> "The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." (Emphasis added).

While plaintiff's motion technically just falls within the one year time limitation, this Court finds that plaintiff's motion has not been made within a reasonable time and must therefore be denied.

3/ But see footnote 2, supra.

As the late and highly respected Judge Judd of this Court noted, in Diapulse Corp. of America v. Compagnie Nationale Air France, 17 F.R.Serv.2d 1453, 1455 (E.D.N.Y. 1973): 69 C - 4120

> "The commentaries and cases make it clear that the one year period is a maximum and is not automatically available. A motion must also pass muster under a test of reasonableness, even if made within the year. ...
>
> "The motion here was made six days short of a year after entry of the order of dismissal. Even if the events which led to the dismissal can be excused as inadvertant, it is doubtful that the request for relief is timely."

In Cavalier Label Co. Inc. v. S.S. Lilika, 71 F.R.D. 395 (S.D.N.Y. 1976), a strikingly similar case to the instant one, plaintiff moved seven days prior to the end of the one year period to reopen the case. The plaintiff in that case had prompt notice of the dismissal of the case and defendant's assurance that he would not oppose a timely motion to reopen. Plaintiff's failure to act until the very end of the one year period led the Court to deny the motion. See also Standard Newspapers, Inc. v. King, 375 F.2d 115 (2d Cir. 1967); Usery v. Weiner Bros. Inc., 70 F.R.D. 615 (D. Conn. 1976). A similar result is required here.

As Judge Judd noted in Diapulse Corp. of America, supra, at 1455, in making a determination as to timeliness,

> ". . . the courts look to the grounds proffered for opening the judgment to see if the grounds could have been presented sooner."

In the instant case, plaintiff's counsel had all the information he needed to make his motion on the day he learned of the dismissal, particularly if the grounds for such a motion were this Court's alleged error in scheduling.4/ Plaintiff's counsel therefore cannot justify the one year delay as necessary for the preparation of the motion itself.

While it is unfortunate that plaintiff's counsel's offices were closed for repairs from June to December, this too does not excuse plaintiff's failure to make the instant motion until now. Plaintiff's counsel had three months prior to the closing of his offices during which he inexplicably devoted his efforts to further investigation of plaintiff's claims rather than take the obvious step of moving to re-open the case. Even with plaintiff's counsel' offices closed, there is no excuse for the continued delay in bringing on the instant motion. Especially given plaintiff's counsel's claimed excuse for his nonappearance in February, 1977, a motion to reopen need only have contained this excuse and a signed affidavit of merits from the plaintiff and this would not have required extensive research. Plaintiff's counsel could have done this notwithstanding the mishap with his offices. At the very least, he could have indicated at the time to opposing counsel or to this Court his continued intention to move to reopen the case and the reasons for the delay.

By failing to move until now and by failing to keep the defendant apprised of his intention so to move, plaintiff's counsel

4/ But see footnote 2, supra.

has lulled defendant into the belief that the case is indeed closed, so that, for this Court to reopen it now might constitute additional prejudice to the defendant.

While the result reached here deprives plaintiff of his day in court, plaintiff, as the employer of counsel, must assume the risks of such counsel's prosecution of the case. See Link v. Wabash R.R. Co., 370 U.S. 626 (1961).

Accordingly, plaintiff's motion to vacate is hereby denied.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1210—September Term 1977.

(Argued June 22, 1978 Decided September 11, 1978.)

Docket No. 78-6075

GENOVA DOMINGUEZ, as Administratrix of the Estate of Francisco Dominguez, Deceased,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

LUMBARD and MANSFIELD, *Circuit Judges,*
and HOLDEN, *District Judge.**

Appeal from an order of the Eastern District of New York, Thomas C. Platt, *Judge,* denying appellant's motion pursuant to Rule 60(b), F.R.Civ.P., to vacate an order entered approximately one year earlier for failure of appellant's counsel to appear at a pretrial conference scheduled by the court. Thereafter, despite repeated notices that the dismissal would stand unless appellant's counsel

* Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

moved promptly to vacate it, no action was taken by counsel for a year.

Affirmed.

ANDRES ASTACIO SANTOS, Esq., New York, N. Y., *for Plaintiff-Appellant.*

BURTON S. WESTON, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Brooklyn, N. Y., of counsel), *for Defendant-Appellee.*

PER CURIAM:

At a time when leaders of the bench and bar are advocating steps to improve the quality of advocacy and to tighten qualifications for practice in the courtroom with a view to improvement in the administration of justice, we are faced upon this appeal with the sad spectacle of how an innocent client can be victimized by gross negligence and incompetence on the part of her trial counsel.

After exhausting her administrative remedies appellant, as administratrix of her husband's estate, filed suit on June 26, 1976, against the Government in the Eastern District of New York under the Federal Tort Claims Act, 28 U.S.C. §§2671, *et seq.*, seeking damages for the wrongful death of her husband by an FBI agent. The death occurred on March 17, 1975, when the agent, his gun drawn, surprised gunmen in the process of robbing Francisco Dominguez, the proprietor of a grocery store. When one of the robbers pointed a gun at him the agent fired twice, killing both the robber and Dominguez, who was holding on to the assailant. Following the Government's filing of its answer

denying liability, no pretrial discovery, motions or other formal actions were taken by either side until December, 1976, when Judge Platt, to whom the case had been assigned, notified the parties that he would hold a pretrial conference with the parties on February 11, 1977, a date that was later postponed to February 18, 1977.

When neither appellant nor her counsel, Andre Astacio Santos, Esq., appeared at the conference on February 18, 1977, the court dismissed the action pursuant to Rule 41(b), F.R.Civ.P. and Rule 8(a) of the Individual Assignment and Calendar Rules of the Eastern District.[1] On the same date the U.S. Attorney wrote Santos a letter by certified mail advising him of the dismissal and requesting that if he intended to move to vacate the dismissal he should do so within 10 days of the receipt of the U.S. Attorney's letter, which was received by Santos on March 5, 1977.

Instead of moving immediately to vacate the dismissal Santos visited the Assistant U.S. Attorney in charge of the case and was advised that unless he promptly moved to reinstate the case the Government would oppose any such application. Notwithstanding this warning, Santos did noth-

1 Rule 41(b), F.R.Civ.P., provides in pertinent part:

"(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Rule 8(a) of the Eastern District of New York Local Rules provides:

"*Dismissal or Default.* Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed at the time set, may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defaulting party either with respect to a specific issue or on the entire case."

ing until January 26, 1978, more than 10 months later, when he moved pursuant to Rule 60(b), F.R.Civ.P., to vacate the February 18, 1977, dismissal on grounds of excusable neglect. Santos' excuses for his inaction were that he had been misinformed by Judge Platt's law clerk regarding the scheduled pretrial conference[2] and that thereafter, following a structural cave-in of the floor of his office on May 27, 1977, his files and records were removed to the basement of the building and became inaccessible until December, 1977.

After hearing the Rule 60(b) motion on February 17, 1978, Judge Platt, on March 13, 1978, filed a memorandum opinion and order denying the motion. He concluded that the circumstances did not amount to excusable neglect within the meaning of Rule 60(b) and that appellant's counsel had not moved within a reasonable time to vacate the judgment.

Discussion

We agree with Judge Platt's findings and conclusions. Indeed, the conduct of appellant's counsel appears to have been so grossly negligent and irresponsible as to call for

2 In his opinion (note 2) Judge Platt points out that in an affidavit supporting his Rule 60(b) motion, Santos incorrectly stated that the law clerk had advised that no pretrial conference was scheduled because no answer had been filed, even though Santos "knew this was not the case, an answer having been filed by defendant the preceding August." Nevertheless Santos failed to bring this fact to anyone's attention or communicate with counsel for the defendant.

Moreover, Santos gave the Assistant U.S. Attorney in charge of the case, at their March 21, 1977, conference, an entirely different reason for his not attending the February 18, 1978, conference, stating that he had "advised Fred Townsend [apparently Judge Platt's law clerk] that he was preparing a motion for summary judgment and [was] excused from attending the status conference on that basis," Memorandum of Asst. U.S. Attorney E. S. Rudofsky re: Conference with Santos, 3/21/77.

an investigation into his competency to practice before the federal bar. By no stretch of the imagination could his 10-month delay in moving to vacate the dismissal be characterized as "excusable neglect" within the meaning of Rule 60(b). See *Slumbertoge, Inc.* v. *Jiggs Inc.*, 353 F.2d 720 (2d Cir. 1965), *cert. denied*, 383 U.S. 969 (1966); *Standard Newspapers, Inc.* v. *King*, 375 F.2d 115 (2d Cir. 1967); *Cavalier Label Co., Inc.* v. *S.S. Lilika*, 71 F.R.D. 395, 397 (S.D.N.Y. 1976). On the contrary, Rule 60(b) obligated him to move "within a reasonable time." Upon receiving written notice on March 5, 1977, that his client's action had been dismissed pursuant to Rule 41 and that an order finalizing the dismissal would be filed unless he moved within 10 days, he was duty bound to move to vacate the dismissal. Any possible doubt about this obligation was removed on March 21, 1977, when he was further advised by the Government's counsel that unless he moved promptly for reinstatement, the Government would oppose its restoration to the calendar. Yet he did nothing for over 10 more months.

The cave-in of Santos' office on May 27, 1977, and storage of his papers elsewhere provides no excuse for his abysmal neglect. From March 5, when he first received notice of the dismissal, until May 27—a period of almost three months—there was more than ample time to file the short and simple Rule 60(b) motion that was required. Thereafter, assuming his files were inaccessible, nothing precluded him from obtaining the original file from the clerk of the Eastern District of New York and preparing the essential motion with supporting affidavit, which probably would not then have been opposed.

Under all of the circumstances Judge Platt's denial of appellant's Rule 60(b) motion filed on January 26, 1978, did not constitute an abuse of discretion but, on the contrary, was clearly reasonable. Unfortunately, appellant

is bound by the inexcusable conduct of her counsel, since there is no particularised showing of exceptional circumstances explaining his gross negligence and no indication of diligent efforts by appellant to induce him to fulfill his duty, compare *United States* v. *Cirami*, 535 F.2d 736 (2d Cir. 1976), with *United States* v. *Cirami*, 563 F.2d 26 (2d Cir. 1977).

The order of the district court is affirmed. In view of the inexcusable neglect on the part of appellant's counsel which gave rise to this appeal, costs will be assessed against her counsel.

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of November, , one thousand nine hundred and seventy-eight

Present: Hon. J. Edward Lumbard
Hon. Walter R. Mansfield
Hon. James S. Holden, D.J.

Circuit Judges.

UNITED STATES COURT OF APPEALS FILED NOV 1 1978 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

GENOVA DOMINGUEZ, as Administratrix of the Estate of Francisco Dominguez, deceased,
Plaintiff-Appellant,
V.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Docket No. 78-6075

A petition for a rehearing having been filed herein by counsel for the appellant, Genova Dominguez,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of November , one thousand nine hundred and seventy-eight.

GENOVA DOMINGUEZ, as Administratrix of the Estate of Francisco Dominguez, deceased,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

78-6075

78-6075

UNITED STATES COURT OF APPEALS FILED NOV 1 1978 SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Genova Dominguez, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman
Chief Judge

Docket Sheet

Docket Sheet DOMINGUEZ vs USA

DATE	NR.	PROCEEDINGS
6-25-76		Complaint filed. Summons issued. (1)cg
8-25-76		ANSWER filed. (2)
9-16-76		Summons ret and filed/executed. (3)
2-18-77		Before PLATT, J. - Case called. No appearance by pltff. Complaint ordered dismissed.
2/22/77		By Platt, J Order dtd 2/18/77 filed re that the case be dismissed. (4
1-31-78		Notice of motion to set aside the order of dismissal ret 2-10-78 filed. mg (5)
2/10/78		Affirmation in opposition to motion to set aside order of dismissal filed.jm (6)
2/10/78		Before PLATT, J. - Case called. Adjourned to 2/17/78 at 11:30 AM. ls ----
2/22/78		Before PLATT, J.-Case called. Pltff's. Motion to re-instate argued. Decision reserved. ls -------
3-14-78		By PLATT,J.- Memo and order dtd. 3-13-78 denying pltffs motion to vacate the order of dismissal filed. copies mailed. fy (7)
4-25-78		Notice of appeal filed by pltff filed. copies mailed. fy (8)
5-25-78		Civil appeal scheduling order filed. Record to be filed with C of A on or before 6-13-78. mg (9)